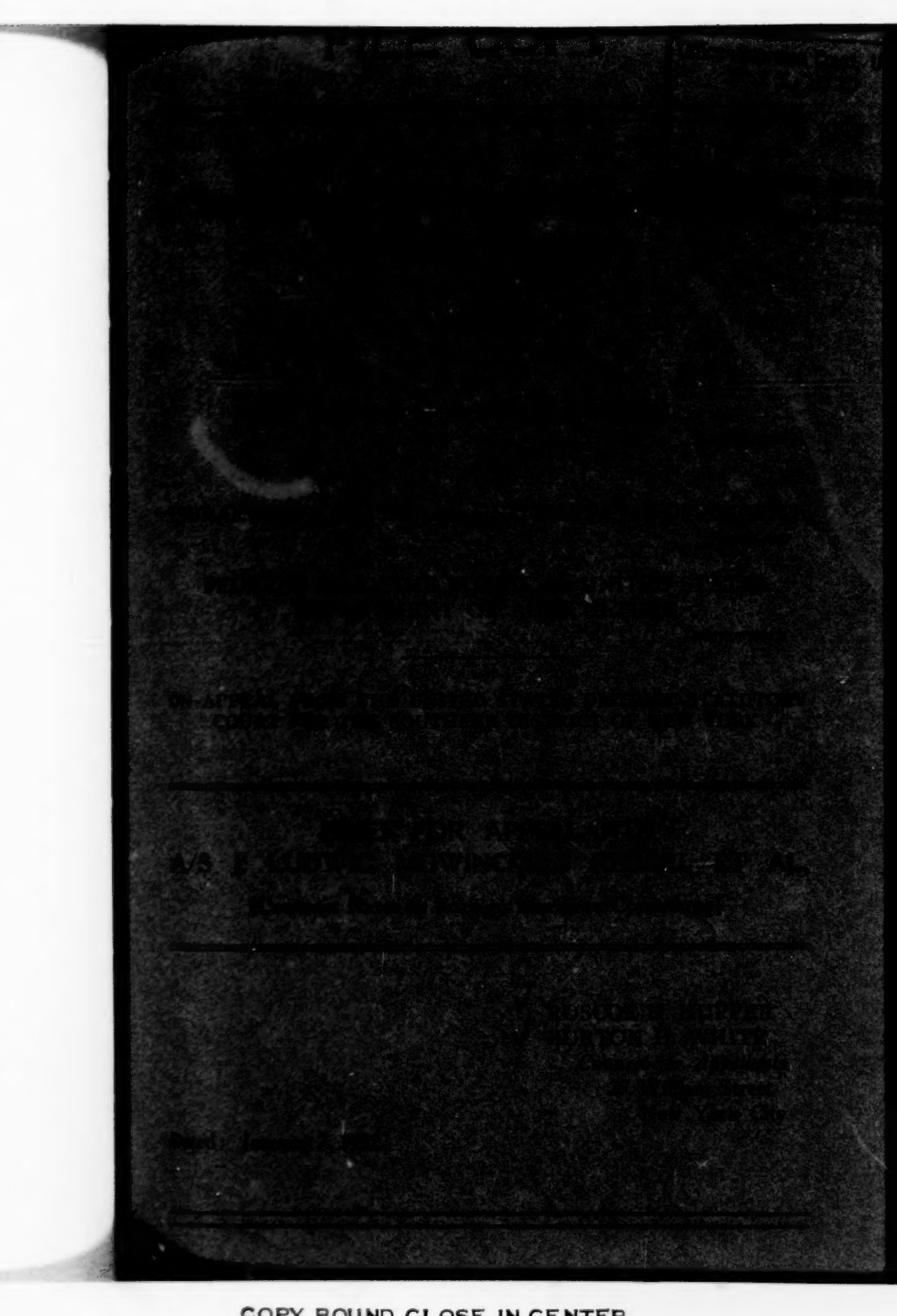


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Supreme Court of the United States

OCTOBER TERM 1951

No. 134

A/S J. LUDWIG MOWINCKELS REDERI, BLACK DIAMOND STEAMSHIP CORPORATION, COMPAGNIE GENERALE TRANSATLANTIQUE, COMPAGNIE MARITIME BELGE, CUNARD WHITE STAR, LTD., DAMPSKIBSSELSKABET AF 1912 A/S, A/S DAMPSKIBSSELSKABET SVENDBORG, N. V. NEDERLANDSCH-AMERIKAANSCHE STOOMVAART MAATSCHAPIJ, UNITED STATES LINES COMPANY, WATERMAN STEAMSHIP CORPORATION, ELLERMAN'S WILSON LINE, LTD., and SOUTH ATLANTIC STEAMSHIP LINE INC., as members of NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE, and/or CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE

Appellants

v.

ISBRANDTSEN CO., INC. and UNITED STATES OF AMERICA

Appellees

FEDERAL MARITIME BOARD and UNITED STATES DEPARTMENT OF AGRICULTURE

Intervenors

BRIEF FOR APPELLANTS A/S J. LUDWIG MOWINCKELS REDERI, ET AL.

Opinions Below

The opinion of the statutory three-judge District Court dated March 20, 1951 (R. 118) is reported at 96 F. Supp. 883. An appendix by Frank, C. J. to said opinion contains the statement, "My colleagues, Judges Ryan and Kaufman,

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regard such an appendix* as superfluous and undesirable. I therefore take the sole responsibility for it." (R. 136).

An earlier opinion of said Court dated December 20, 1948 (granting an interlocutory injunction pending proceedings which said Court ordered to be taken before the Maritime Commission—now Federal Maritime Board) is reported at 81 F. Supp. 544. An appeal taken to this Court against that Court's order of January 13, 1949 implementing said opinion was dismissed without opinion, April 4, 1949, 336 U. S. 941.

Jurisdiction

The final order of the three-judge District Court now under appeal was entered March 21, 1951 (R. 148), following review by said Court of the Maritime Board's order of December 1, 1950, which had dismissed the Isbrandtsen complaint in the Board's Docket 684. The order allowing appeal was signed by District Judge Samuel H. Kaufman May 17, 1951 (R. 151) and filed that date. The jurisdiction of this Court on this direct appeal from the Court's order granting a permanent injunction rests on Title 28, U. S. C. 1253 and 2101 (b). This Court noted probable jurisdiction October 8, 1951 (R. 167), on which date also probable jurisdiction was noted of appeal from the District Court's order taken by Federal Maritime Board, which had intervened in the District Court in support of its December 1, 1950 order in its Docket 684 dismissing the complaint in that docket. That appeal is No. 135 on this Court's docket.

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* Projection of the appendix was "*without expressing an opinion as to the cogency of those arguments*" (R. 136). In next to his final paragraph, Frank, C. J., said: "I repeat that I express no opinion as to the cogency of any of the foregoing arguments" (R. 148).

These several *caveats*, including that of both District Judges, would appear to discourage discussion of items in the appendix, which possibly should be regarded as having the limitations of a soliloquy.

Statute Involved

Shipping Act, 1916, 39 Stat. 733, 736, Secs. 14, 15, 22 (46 U. S. C. 812, 814, 821). These sections are set forth in Appendix A hereto, pp. 55-58.

Questions Presented

1. Did the Statutory Court have authority to set aside, and did it properly set aside, the December 1, 1950 order of the Federal Maritime Board (R. 67) on the ground that a percentage differential between "contract and non-contract" freight rates proposed by appellant freight carriers and found permissible by said Board under Sec. 15 of the Shipping Act 1916, in an adversary proceeding ordered January 13, 1949 by said Court, was "arbitrary" and hence "unjustly discriminatory" (not charged in the complaint)?

2. Did said Court thereupon lawfully grant a permanent injunction to plaintiff carrier Isbrandtsen against appellant carriers entering into contracts with shippers, not parties to the proceeding and not complaining against such contracts, under such "contract rate system" as administratively approved December 1, 1950 by said Maritime Board?

3. Did the Federal Maritime Board, because of Section 14 of the Shipping Act, 1916, lack authority under the provisions of Section 15 of said Act, to approve the use of a "contract-rate system", so-called, under contracts between shippers and steamship carriers (operating together in the foreign maritime commerce of the United States under Conference agreements approved by said Board under said Shipping Act) by which contracts shippers would agree to confine their shipments to the lines of such Conference carriers for specified limited periods in consideration of freight rates lower than those charged by such carriers to other shippers who might not choose so to contract?

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Statement of Case

Appellants are common carrier steamship lines of many nationalities—American, British, French, Belgian, Dutch, Norwegian and Danish—operating in the foreign maritime trade of the United States, associated in Conferences to maintain uniform rates and practices in transportation of cargo in said trade pursuant to Sec. 15 of the Shipping Act 1916. The two Conference agreements here involved—east-bound and west-bound—as amended from time to time, were duly approved by the Maritime Commission at various dates, as appears from the agreements annexed to the complaint (R. 11-29). By these approvals the agreed coöperation provided for members of said Conferences was excluded from application of the anti-trust laws, comformably to the provisions of said Sec. 15 in both the export and import trades.

Similar Conferences for the same purposes have been in existence and in operation for very many years, although first receiving statutory approval in this country by said Shipping Act. That Act followed an intensive Congressional investigation of world shipping by the so-called Alexander Committee, with report and recommendations in Vol. 4, H. R. Doc. No. 805, 63rd Cong., 2nd. Sess. (1914).

The present controversy arose in connection with the "contract rate" practice as specifically authorized by the approved Conference Agreements between the appellant carriers. This practice, employed by Conferences generally over a period of many years in foreign trade, permits any shipper who contracts for exclusive routing on Conference line vessels to receive the benefit of rates lower than the regular or "non-contract" rates for the same commodities, giving assurance of rate and service stability for certain periods from all the carriers in the particular Conference.

The contract form is at R. 32-36.

The contract rate practice was generally suspended during World War II and the immediate postwar period

when shipping was to so large an extent under Government control (R. 942). October 1, 1948 the appellant Conference members gave notice of resumption of the contract rate system as of November 1, 1948, to apply to all important commodities of which there was regular shipping movement (Ex. 1-I, R. 31, 278; Ex. 1-K, R. 37, 279).

The Conferences are open to membership of all carriers which provide regular common carrier services in the ocean trades involved. Upon joining, all such carriers automatically become entitled to participate in the contracts with shippers. Isbrandtsen did not elect to join either of these Conferences, but appears to have made similar contracts with shippers from time to time (Ex. 9, R. 1125, 490; Ex. 11, R. 1128, 543).

Isbrandtsen assailed the Conference lines' contract system and under its complaint secured on October 28, 1948, a District Court order restraining appellants from instituting their contract rate system as proposed for November 1, 1948. Many contract forms had already been sent to shippers and returned to the Conference Chairman (R. 680). The complaint sought a permanent injunction on the assertion that the Maritime Commission could not legally authorize any contract rate system.

The Maritime Commission intervened and joined with appellant carriers in a motion to dismiss the complaint because of the Commission's primary jurisdiction over the subject matter (R. 41). December 20, 1948 the Court rendered an opinion denying that motion, and providing for a preliminary injunction. Its order of January 13, 1949 conditioned its preliminary injunction on Isbrandtsen's diligent prosecution of a complaint before the Maritime Commission (81 F. Supp. 544, appeal dismissed 336 U. S. 941; No. 622, October Term, 1948).

Isbrandtsen thereupon, February 1, 1949, filed its complaint with the Maritime Commission (R. 167). After preliminary manoeuvres by Isbrandtsen, designed to avoid any hearing on the facts, exhaustive hearings were held

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May 9-26, 1949 before the trial Examiner. He filed his first recommended decision October 5, 1949, approving the contract rate system as not being in violation of Sec. 14(3) of the Shipping Act (R. 202-24). Isbrandtsen's exceptions thereto were argued before the full Commission December 19, 1949. On that date the Commission remanded the record to the trial Examiner with direction for further findings (R. 225). That remand order was modified January 13, 1950 (R. 229) granting a motion made by Isbrandtsen (not opposed by appellants) December 30, 1949 (R. 225-228) to "insure completeness of the record herein" and for Findings, etc., "as to whether the exclusive patronage contract system proposed to be instituted by the respondents, and the forms of exclusive contracts to be employed in connection therewith, are discriminatory or retaliatory." (R. 228).

The Examiner's supplemental recommended decision pursuant to the modified remand order of January 13, 1950 was filed February 21, 1950 (R. 230-254), with rulings on Isbrandtsen's requested findings and conclusions (R. 254-262).

On March 8, 1950 briefs were filed by both sides on Isbrandtsen's exceptions to said supplemental recommended decision but the exceptions were not argued until October 18, 1950, and then before the Federal Maritime Board, of 3 members, inasmuch as the Maritime Commission, of 5 members, had been abolished May 23, 1950.*

---

* On May 24, 1950 the President, by Reorganization Plan No. 21 of 1950, with the acquiescence of Congress, created the Federal Maritime Board and transferred to it certain powers of the United States Maritime Commission, including all those relevant to this case.

The Shipping Act, 1916, established the United States Shipping Board. This Board was abolished by Executive Order No. 6166 of June 10, 1933, which transferred its powers to the Department of Commerce. The Merchant Marine Act, 1936, 49 Stat. 1987, 46 U. S. C. 1114, transferred these powers to the newly-created United States Maritime Commission.

December 1, 1950 the Board handed down its decision with full discussion, findings and legal references substantially in accord with the Examiner's recommendations (R. 51-67). Subject to slight modification suggested in the contract form, immediately agreed to by appellant carriers (R. 44) this decision held that the proposed contract rate system was "not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and does not operate to the detriment of the commerce of the United States and is not in violation of the Shipping Act, 1916, * * *." (R. 67).

Simultaneously the Board entered its December 1, 1950, order dismissing the complaint.

Isbrandtsen thereupon, December 20, 1950, filed its amended complaint in the District Court, similar to the original, except that it attacked in addition to the Maritime Commission's original orders which had approved the conference agreements containing contract rate provisions, the Board's order of December 1, 1950, which had dismissed Isbrandtsen's complaint before that agency (R. 67). The appellant carriers and the Federal Maritime Board moved to dismiss the amended complaint (R. 72). The Department of Justice and the Department of Agriculture which had intervened before the Commission supported Isbrandtsen's position in opposition to that motion.

After hearing all parties on December 20, 1950 (R. 68) the District Court on January 25, 1951 filed an opinion granting a permanent injunction. This opinion, notwithstanding that copies had already been issued to parties by the District Court Clerk, was recalled and vacated by a "supplemental opinion" entered March 21, 1951 (R. 118). The same day (March 21, 1951) the Court entered the order from which this appeal is taken which (1), set aside the Board's December 1, 1950 order but *not* the earlier orders approving the Conference agreements; and (2), perpetually enjoined the defendant carriers "from taking

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any steps to execute or effectuate, directly or indirectly, any contracts with shippers containing the contract/non-contract dual rate system, pursuant to the contract/non-contract provisions of the conference agreements numbered 4490-6 and 7920-1 and heretofore proposed to be effectuated by said defendants in the North Atlantic trades, on November 1, 1948" (R. 148-9).

The Court made a strained and misguided interpretation of the Examiner's finding 14 that the respective rates were fixed by means of an arbitrary differential, i.e., percent difference between the contract and non-contract rates (R. 124-28). The Court then proceeded to use and apply this finding as indicating a *result*, instead of a mere *means* indicating a spread between two sets of rates. That factor of a "spread" is implicit and necessary in any contract rate system—as had been made abundantly clear both by the Examiner and by the Board. The contract rates were in substance to be "special rates", so understood by the Board (R. 60).

The opinion concluded that the proposed rate system was "unjustly discriminatory" and hence unlawful (R. 128).

The opinion did not otherwise identify the alleged unlawfulness, nor did it suggest other than vaguely and speculatively what class of persons or interests would be discriminated against.

Errors Assigned

The errors to be urged are those set forth in appellants' assignment of errors dated May 16, 1951 other than those numbered 5 and 6 (R. 152-54).

Summary of Argument

1. This Court in *United States Navigation Co.* v. *Cunard S. S. Co., et al.*, 284 U. S. 474, emphasized the necessity for exclusive administrative determination of administrative questions of the nature here presented. That decision unquestionably represents the law as settled up to this time.

Even after this case was back in the District Court under Isbrandtsen's amended complaint, after the Board's administrative decision of December 1, 1950, had dismissed the complaint in its Docket 684, the Court in substance took the Board's view of both legal and factual questions—and then evaded stating the natural and necessary conclusion, by indulging in what appears to be a play on the word "arbitrary".

2. The Board rested its decision on full and careful determinations of broad basic questions of fact as required by the Shipping Act, fully supported by the testimony of well qualified witnesses. The essential basis of the Board's determination and judgment is amply disclosed in its report of December 1, 1950. *Alabama Great Southern Railroad Company* v. *United States*, 340 U. S. 216, 228.

3. Where "expertise" is involved, as here, the administrative determination should not be set aside by a reviewing court unless clearly contrary to applicable law or unsupported by evidence. *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 224; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304. The decision of the Court below would appear to be a compelling illustration of the necessity for exclusive determinations by a qualified administrative body.

4. This case was not initiated or heard as a rate case. The Court had no right to inject an untendered issue (i.e. "arbitrary") as to the spread between particular contract and non-contract rates. *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143, 154-5. The fact

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that the differential ("spread") was fixed on a percentage basis was apparent to all from the outset. If this of itself made the differential unlawful there could have been no excuse for the Court referring the case to the Commission, nor for the lengthy hearings there. *North Carolina* v. *United States,* 325 U. S. 507, 512. "Arbitrary" is a word of art in rate-making parlance, signifying a differential to be applied to a basic rate, but not implying any impropriety. The percentage differential here was not capriciously arrived at but had been used previously in these and various other Conferences with the approval of the Board's predecessors—thus being entitled to presumption of validity. *American Railway Express Company* v. *Lindenburg,* 260 U. S. 584, 589. Similar differentials have long been approved for round trip, excursion, commutation and party rate tickets. *Interstate Commerce Commission* v. *B. & O. Railroad,* 145 U. S. 263. The Court's theory as stated might be construed to forbid any differential no matter how slight, or how arrived at.

5. Apart from the Congressional policy to substitute regulation for prohibition in respect of collaboration (Conferences, etc.) in shipping affairs, paralleled in various other statutes, it is clear here that appellants were taking lawful and non-monopolistic steps for their own benefit and that of their shippers, without any prejudice to Isbrandtsen other than ordinarily results from competition between carriers. There is nothing improper in the efforts of common carriers to establish a uniform system of rates, an avowed objective of various regulatory statutes. The existence of legitimate economic objectives is an important aid in the interpretation and analysis of the facts. *Appalachian Coals, Inc.,* v. *United States,* 288 U. S. 344, 372.

6. The various provisions of the Shipping Act as construed and applied by the Board and its predecessors both in respect of standards for admission of carriers to Conferences, and as controls over unreasonable rate practices, etc., foreclose and avoid any charge of unconstitutional

delegation of power. *Lichter* v. *United States,* 334 U. S. 742, 784-5; *N. Y. Central Securities Co.* v. *United States,* 287 U. S. 12, 24-25. It is unduly late in the day to seek to ferret out points of unconstitutionality in the Shipping Act or in the conventional and long established practices and performances thereunder.

7. The provisions of Sec. 14 of the Shipping Act did not apply in any respect to forbid or prevent approval of the contract rate system. The only relevant portion of Sec. 14 is subsection 4 relating specifically to contracts with shippers. Sec. 14 (1) relating to deferred rebates and Sec. 14 (2) relating to fighting ships are not involved here. Sec. 14 (3) is directed to "retaliation". No retaliation is involved here, for the right of shippers to contract is not dependent upon past refraining from patronage of other carriers. Nor is there any substance to the contention that this section covers discrimination other than retaliation whether or not it be "unjust". In the first place, there can be no discrimination in having two sets of rates open to all. Secondly, the uniform construction of the Act requires that the discrimination outlawed in Sec. 14 (3) be the kind of discrimination (i.e. unjust) outlawed in Sec. 15 and other sections of the Act. *United States* v. *American Union Transport, Inc., et al.,* 327 U. S. 437; *Helvering* v. *New York Trust Company,* 292 U. S. 455, 464.

ARGUMENT

POINT I

The decision of the Federal Maritime Board was supported by adequate evidence and was not contrary to law.

United States Navigation Co. v. *Cunard S. S. Co., et al.,* 284 U. S. 474, held that "contract rates" in our foreign shipping trade should be dealt with exclusively by the administrative body (then the Shipping Board) instead of the Courts.

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The plaintiff there, being also an independent (non-Conference) line sought under the Sherman and Clayton Acts in the District Court to enjoin Conference carriers from using contracts with shippers applying such rates. Motion to dismiss for lack of jurisdiction was granted in the District Court, 39 F. 2d 204. This action was affirmed by the Circuit Court of Appeals, 50 F. 2d 83. On certiorari this Court said, 284 U. S. at 485:

> "The act [Shipping Act, 1916] is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal."

The Maritime Commission and Federal Maritime Board guided themselves in the present case by these several considerations, and after long study rendered their complete and well-considered decision. This was done pursuant to the District Court's direction (81 F. Supp. 544), notwithstanding lack of sympathy and coöperation on the part of Isbrandtsen.

At the pre-hearing conference in Washington, April 5, 1949 before the Commission's Examiner, Isbrandtsen's counsel said:

> "* * * we raise no question whatsoever as to whether or not the contract system is unreasonably discriminatory or unjustly prejudicial. The only thing we

raise in our pleading is whether or not the contract system on its face constitutes a discrimination." (R. 193).

Further on, Isbrandtsen's counsel said: "I am suggesting that the first issue we pose in our pleading is the question of whether or not the contract-non-contract system is discriminatory." (R. 197).

On being asked: "Against whom?", counsel replied: "Is discriminatory against no one; for the time being, just per se discriminatory."

At the formal hearing before the Examiner in New York, May 9, 1949, co-counsel for Isbrandtsen continued the contention that complainant Isbrandtsen was not obliged to proceed with a factual presentation as part of an adversary proceeding, saying "that it is solely a legal case" based on Conference documents, and stating (R. 285-86): "We have offered documentary proof here that these Conferences and these respondents are violating the law, the criminal law, by the use of these papers submitted in evidence and are filed with the Commission by their announcement to the trade and otherwise."

The Commission had by its order of March 8, 1949, (preceding pre-hearing conference April 5) denied Isbrandtsen's "Motion for Expedited Procedure"—which was based on the contention that only naked questions of law were presented. Said order recited: "* * * it appearing that important questions of fact as well as of law are involved in this proceeding." (R. 183-184).

Had the questions raised by Isbrandtsen's original complaint before the District Court been in truth so restricted as was contended for by Isbrandtsen's counsel, both at the pre-hearing conference April 5, 1949 and at the hearing May 9, 1949 (as well as in Isbrandtsen's "Motion for Expedited Procedure"), the Court would have had no option to entertain the complaint. Rather it would have been obliged to dismiss the complaint out of hand by virtue

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of this Court's decision in the *Cunard* case, where the same legalistic contentions had been put forward.

However, the December 20, 1948 decision of the District Court abundantly shows that the Court regarded the complaint as presenting important factual matters for consideration by the Commission, particularly under Sec. 15 of the Shipping Act (46 U. S. C. A. 814) which provides: "The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations." See *Isbrandtsen Co., Inc.* v. *United States, et al.*, 81 F. Supp. 544, 546.

It is apparent that the obligations of the administrative body under Section 15 as concerns disapproval, cancellation, etc. of agreements could not be met without full hearing and consideration of all relevant factual matters.

Over Isbrandtsen's opposition, and in full coöperation with the Commission, appellants developed a complete record of some 1400 pages, touching the broad questions of commerce, economics and competition, so as to permit the thorough analysis intended both by the Court and the Commission in conformity with the law.

Inasmuch as counsel for complainant Isbrandtsen had declined to call witnesses for presentation of factual matters before the Examiner, May 9, 1949, counsel for respondent Conference lines [appellants] thereupon called Mr. Hans Isbrandtsen, President, likewise Mr. Matthew S. Crinkley, Vice-President, of Isbrandtsen Company to be the first two witnesses. They were both well informed shipping men, and a considerable body of facts was developed from their testimony.

The Court in its March 20, 1950 supplemental opinion (R. 120) assumed, in accordance with the Board, that a contract rate system could be approved. This shows that the Court did not consider that the Board's decision was basically contrary to law. In other words, the Court regarded the matter as also one of fact, notwithstanding Isbrandtsen's repeated and persistent contentions to the contrary.

Adequate Supporting Evidence

The Board reached its conclusion that the dual rate system qualified for approval under Sec. 15 of the Shipping Act—notwithstanding the opposing arguments based on Sec. 14 (3)—upon the basis of factual determinations. Although not labeled "Findings" these determinations are to be considered and dealt with as such. *Alabama Great Southern Railroad Co.* v. *United States*, 340 U. S. 216, 228. Said determinations of the Board are in general accord with those made by its Trial Examiner; they are fully supported by the testimony of witnesses taken at the hearing.

We set forth here, with comments on the evidence, the more important matters determined and found concerning the contract rate system:

(1) "Small shippers are put on the same plane with large shippers and both are thus encouraged to engage in 'forward trading' so necessary for foreign commerce" (R. 64).

The beneficial effect of the present system of uniform and open contracts with all shippers alike was particularly stressed in the testimony of Mr. Morris Rosenthal (R. 773, 778). The head of a large import and export company and president of the National Council of American Importers, Mr. Rosenthal was fully qualified to express the point of view of American shippers generally on this as on other aspects of the

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contract rate system. Commodore Lee, an executive of an important American carrier in the foreign trade, with experience both in and outside Conferences, and Dr. Arnold K. Henry of the Wharton School of the University of Pennsylvania, both testified to the same effect (Lee, R. 956-7; Henry, R. 807).

(2) "That [contract rate] system in many cases is a necessary part of the conference system" (R. 63).

The testimony made clear the role of the contract rate system in holding the Conferences together, and in the prevention of internecine rate wars (Rosenthal, R. 770, 798; Sinclair, R. 689; Lee, R. 956; Henry, R. 805-6). Even Isbrandtsen's officers admitted that operating costs on foreign (versus American) flag vessels are lower (Isbrandtsen, R. 564; Crinkley, R. 507). They were unable to explain how American lines could survive in the face of unrestricted competition at the lower rates which would still return a profit to foreign operators (Isbrandtsen, R. 566-7; Crinkley, R. 506-7).

(3) "If the conference members are to provide the service which the shippers value, the service must be matched by a regular availability of cargo from those shippers" (R. 63).

To secure fair assurance of a steady flow of goods for shipment is one of the chief purposes of the contract-rate practice, as with all "requirements contracts". Indeed, Isbrandtsen's vice-president frankly testified that this was the reason his own company had entered into such contracts with shippers (Ex. 9, R. 1125, 490, and Ex. 11, R. 1128, 543) prior to World War II (R. 376-7). Mr. James Sinclair, who served for sixteen years as Conference chairman, emphasized the community of interest, arising out of their mutual interdependence, of carriers and shippers. He made it clear that the contract system was adopted, not for

the purpose of forcing non-Conference members out of the trade, but rather as a means of holding the Conferences together—as a shield and not a sword (R. 691).

The Board noted that there was evidence "that shippers are willing to pay rates to sustain stability and frequency of service, which means more to them over a period of time than being able occasionally to avail themselves of some lower rates offered by non-conference carriers" (R. 63). It also stated that "shippers have testified in this case that they deem the stability of rates and regularity of service which a Conference can offer are worth a price measured in terms of freight rates" (R. 64).

As Mr. Rosenthal's testimony demonstrated, stability in freight rates means much to exporters and importers in their buying and selling operations (R. 766). The testimony shows that in the main shippers favor the contract system (Rosenthal, R. 770; Sinclair, R. 687).* Conference Chairman Andrews testified that shippers had executed and returned some 3000 of the approximately 4500 contract forms distributed to the trade between October 1 and October 28, 1948, when the injunction in this cause was issued (R. 680). The record thus fully supports the Trial Examiner's refusal to rule (Isbrandtsen's proposed finding of fact No. 22, R. 260) that this response on the part of shippers was "despite their opposition to the exclusive patronage system" or that "most shippers are opposed to the contract system." (Proposed finding No. 21, R. 260).

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* The opposition expressed for the Department of Agriculture is not entitled to weight. Government shipments take the lowest rates without a contract (R. 648). Turner, the Department's witness, stated that he had not obtained the views of private shippers of agricultural commodities (R. 643). Shippers not affected by a rate are not entitled to question it. *Avent* v. *United States*, 266 U. S. 127, 131.

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(4) "By obtaining exclusive contracts from shippers the carriers are better able to estimate the approximate volume of traffic that is to be expected, tonnage their routes, and arrange sailings accordingly" (R. 64).

> Mr. Rosenthal's testimony made it plain that the contract rate system enables the lines to "give us shippers what we want in the way of regular scheduled sailings, good vessels, proper terminal facilities, and proper handling of cargo." (R. 772). That the carriers likewise benefit from this regularity was testified to by Conference Chairman Andrews (R. 910) and Dr. Henry (R. 806).

Equally important with its positive findings was the Board's negative finding that "there is no evidence that the dual rate system has in the past, or will in the future effectively cause the exclusion of an independent carrier from any trade route on which he wishes to operate". (R. 62-3). Mr. Sinclair, who, as above noted, was Conference chairman for 16 years, testified that he knew of no instance where the contract rate system ever put a non-Conference line out of business (R. 691). There was no testimony to the contrary. Except during the war years Isbrandtsen has regularly maintained its scheduled services. Mr. Isbrandtsen himself asserted: "We will always be able to take care of ourselves in my company" (R. 569). That this was no idle boast is certified to by Isbrandtsen's tariff of rates substantially below those of the Conference lines. The Examiner in his supplemental report said (R. 236-37):

> "As pointed out on page 14 of the first recommended decision—'Exhibits of record indicate that the general pattern of rate basis used by complainant from November 6, 1939, to April 30, 1940, was conference rates less 10 percent. Effective August 1, 1946, complainant in effect adopted all the conference rates and classifications in the eastbound tariff, copying them word for word, including certain typographical errors. This tariff contains 581 commodities on

> which complainant's rates are from 3.3 percent to 53.4 percent lower than the conference rates.' It is abundantly clear from the record that the conference rates have been a boon to complainant and that complainant has been enabled to charge higher rates than would have been possible had there been unbridled competition with attendant open rates. Furthermore, the relative stability of the conference rates has afforded complainant a greater degree of flexibility in fixing its rates to draw cargo from the conference lines. Complainant's vice president in charge of liner business admits that his rates are fixed at the level that will secure the traffic."

And see Exs. 12A, 12B and 12C (R. 1130-1184).

The testimony showed that there were, in addition to Isbrandtsen, at least two other carriers—one American line and one foreign line—who preferred not to join the conferences but to conduct their operations independently (Isbrandtsen, R. 303-4). The record was devoid of any evidence that appellants' contract rate system would prevent any of these lines from continuing in the trade, or injure them, as competitors, in any legal sense.*

The Board stated, "There is also evidence that even though rates of conference members are identical, there is

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* It is in order to mention here that there was not the slightest basis of fact before the District Court for the statement in its opinion of December 30, 1948, "The plaintiff would be gravely prejudiced" (81 F. Supp. at 546-7); nor for the statement in finding 9 (id. 546), "the institution of proposed exclusive patronage dual tariff system would greatly injure its [plaintiff's] business as an independent carrier". This falls under the introductory paragraph (id. 545), "It appears without substantial dispute that". Nevertheless, said several unsupported statements were availed of for issuance of the temporary injunction. We mentioned this subject at pp. 7-8 in our "Application to Transfer to Summary Docket" in No. 622, October Term 1948. Thereby the jurisdiction of the District Court was conserved and continued until after the decision of the Maritime Board December 1, 1950.

The Court Stenographer's minutes covering the discussion had January 10, 1949 of Finding of Fact 9, on settlement of the injunc-

(Footnote continued on following page)

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competition among the members in the matter of the service offered." (R. 63). The signing of a Conference contract in no sense obligates shippers to patronize any particular member line. As Mr. Rosenthal pointed out, the Conference lines still compete vigorously in the "many other intangibles that constitute service." (R. 772). Commodore Lee stressed that the contract system "doesn't change the competitive necessity at all. It only changes the competitive methods. We are just as active and maintain just as large

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tion order, show at pp. 131-132 that Isbrandtsen's counsel directed the Court's attention to proposal by defendants for deletion of

> "the Court's essential finding of irreparable injury by eliminating the Court's conclusion that the institution of the exclusive patronage system 'would greatly injure the business [of Isbrandtsen] as an independent carrier' * * * They want to change our indispensable finding of irreparable injury.
>
> * * * * *
>
> Mr. Hupper: With respect to that, the record here shows that there are other independents; not merely the plaintiff.
>
> Judge Rifkind: That was intended to be a finding purely on the technical requirements of irreparable injury.
>
> Mr. McGovern: Precisely.
>
> Judge Rifkind: It was not intended to describe the functions or purposes of the contract system."

In the November 3, 1948 hearing the Court Stenographer's minutes show, p. 78, the following colloquy:

> "Judge Frank: Then there might be irreparable injury here which might justify a stay.
>
> Mr. Hupper: I don't think so. What is 'irreparable injury'?
>
> Judge Frank: None of us want to spend our time defining it."

The decision of the Board did not find or suggest any damage to Isbrandtsen. Isbrandtsen did not seek to prove damage, or likelihood of it, before the Commission or the Board—merely claiming that because the preliminary injunction had been issued by the District Court (done solely on the basis of the foregoing unsupported assertions) damage was to be assumed as adequately established (R. 195-96).

a staff to maintain business now as we would if we were independent operators." (R. 957-8). The competitive aspects of the Conference system were also described by Chairman Andrews (R. 597-8) and Mr. Sinclair (R. 689).

POINT II

The principle of administrative finality prohibited the court below from setting aside the order of the Maritime Board.

This Court has often emphasized that administrative agency action involving expertise (inherent in a case of this nature) is final and must not be set aside by a reviewing court unless definitely found to be contrary to applicable law, or to have no substantial supporting evidence. The Court below disregarded this mandate. See *Radio Corporation of America, et al.* v. *United States*, 341 U. S. 412, 420; *Niagara-Hudson Corp.* v. *Leventritt*, 340 U. S. 336; *Alabama Great Southern Railroad Company* v. *United States*, 340 U. S. 216, 228; *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 535-6; *United States* v. *Detroit Navigation Co.*, 326 U. S. 236, 241; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65; *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87-8; *National Broadcasting Company* v. *United States*, 319 U. S. 190, 224; *Gray* v. *Powell*, 314 U. S. 402, 411-12; *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 184-5.

The supervening principle against courts substituting their discretion and judgment for that of the administrative body, so frequently announced by this Court, was also applied to determinations of the Secretary of Commerce under the Shipping Act in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297. There a three-judge Court had affirmed the decision of the Secretary of Commerce holding invalid a system of contract rates in the *intercoastal* trade. The economic and competitive situations there were dif-

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ferent from those in the foreign trade. The intercoastal rates were regulated under the Intercoastal Shipping Act, 1933. Mr. Justice Stone in concluding his affirming opinion made it clear that although in his view the evidence might have lent support to a different conclusion, this Court was without authority to substitute its judgment for that of the Secretary of Commerce, 300 U. S. at 307.

The doctrine of administrative finality as confirmed by the several cases above cited is specially compelling where the problems and questions require application of the specialized knowledge and experience of a skilled administrative body.

That such is particularly the case here is demonstrated by the legislative background and history of the Shipping Act, fully set forth in the "Alexander Committee Report", H. R. Doc. 805, 63rd Cong., 2nd Sess. (1914). See particularly Vol. 4, pp. 295-303; 415-21.

This four-volume report and recommendation covered exhaustive investigation and study (1912-1914) of the competitive problems of the maritime industry and needs of the same in respect of the commerce of the United States. It was the background, basis and source of the 1916 Shipping Act.

The Committee recognized that, because of the absolute freedom of the seas, indivisibility of the ship transportation unit, great differences in capital and operating costs of competing carriers of varying nationality, likewise the constant threat of tramp operators to regular line services, etc., some means of self-protection must be permitted, indeed encouraged, in order to avoid disastrous rate wars and to secure the advantages of stability in service and rates essential to shippers and carriers alike. It was the opinion of the Committee that the problems involved in the foreign trades required special legislation to be applied by an experienced and skilled administrative body familiar with the intricacies of the entire world-wide shipping industry, and

the competitive and other complicated conditions under which it operated.

Both the Alexander Committee and the Congress which enacted the Shipping Act, 1916, were fully aware of the restraints upon the absolute freedom of competition imposed by the coöperative activity of shipping associations. The Committee report is replete with references to them. The Clayton Act had been enacted in 1914, ahead of the Shipping Act. Nevertheless the Committee reported and the Congress decided against outlawing the coöperative agreements of such associations which had been found in the past to have protected the interests of the industry and contributed to the stability of rates and practices. Instead they were specifically permitted, subject always to expert administrative approval under Sec. 15 of the Shipping Act which exempted approved agreements from application of the anti-trust laws; and which in its various other sections provided for adequate protections to the shipping public and others concerned.

Agreements between competing carriers themselves as to rates and practices became insufficient and inadequate when non-Conference carriers remained free to take advantage of the stability thus created to provide intensified competition at cut rates when that appeared to them to be advantageous. To protect themselves in this position associated carriers had adopted the system of contract rates of the character now under consideration. The Alexander Committee after careful study did not recommend the outlawing of the contract rate practice, which outlawing it applied to certain other practices. Under the Shipping Act, passed pursuant to the Committee's recommendations, that matter of practice fell without specific mention among those left for administrative supervision.

Under the Act the administering agency must in each instance upon all the facts and circumstances and upon the basis of its accumulated knowledge and experience determine its proper action for enforcing the law.

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It is fair to state that the several agencies which have administered the Shipping Act would appear to have performed their functions reasonably well. In one way or another their activities have touched and affected (or been somehow affected by) the maritime commerce of the entire world.

Projection and up to date recognition of the Alexander Committee Report are instanced by H. R. Rep. 1100, 80th Cong., 2nd Sess. (1947) on the Reed-Bulwinkle Act, 49 U. S. C. 5 b, 62 Stat. 472, where the advantages of intercarrier coöperative rate making were recognized. Sec. 15 of the Shipping Act was there referred to as a precedent. MERCHANT MARINE STUDY AND INVESTIGATION, S. Rep. No. 2494, 81st Cong., 2nd Sess. (1950), pp. 84-86, recognized and emphasized the principles of the Alexander Committee Report.

POINT III

The examiner's finding did not differ from that of the Board in respect of the differential and did not justify the action of the Court on "arbitrary."

This controversy was not initiated or conducted as a rate case, as is clear from the complaint (R. 1-9), which attacked only the basic validity of the contract rate system. Isbrandtsen's counsel objected to evidence on differentials between its rates and those of the Conference lines (R. 728). The trial Examiner in speaking of contract/non-contract rates said "there is no evidence in this proceeding as to the reasonableness of the two types of rates." (R. 246). The Court had no right to inject on review any issue as to rates. *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143, 154-5. Such an issue, when it may exist, is for administrative, not court, determination. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 251-2. Here the subject was constructed and injected

by the Court. How inappropriate it was will appear from a mere glance at the limited purely legalistic grounds of the Complaint (R. 170-71).

Nevertheless, the Court based its determination solely on what it described as a "pivotal fact" asserted to be have found by the Examiner, i.e., alleged unreasonableness of the spread between the contract and non-contract rates. The Examiner had made no such finding. To the contrary he had said (R. 242):

> "The record contains nothing but general statements that the conference rates are unduly high. Merely because the lines are willing to take less for transporting the cargo of contract shippers does not mean that the non-contract rates are unreasonable to the extent they exceed the contract rates. It is simply a willingness on the part of the lines to be content with a lesser profit in return for the knowledge that probably they will secure the great bulk of cargo moving on the route."

Likewise he had refused to accede to plaintiff's proposed conclusion of law No. 1 reading as follows (R. 261):

> "The contract/non-contract rate system proposed to be put into effect by the Respondents as of November 1, 1948, provides for a difference in rates for identical services based solely upon whether or not the carrier secures the shipper's service exclusively and is, therefore, discriminatory in violation of Section 14 of the Shipping Act of 1916, and is unlawful."

Nothing could be clearer than the Examiner's disavowal of the very proposition upon which the District Court based its decision.

The Court's error would appear to stem from the Examiner's adoption of the proposed finding No. 14 submitted by Isbrandtsen's counsel reading as follows (R. 258):

> "14. Shippers were informed that failure to sign such a contract would entail application to their shipments by respondents' lines after November 1,

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> 1948 of non-contract rates which were fixed by means of an arbitrary differential at a level 20% to 30% higher than the currently existing scale."

It would appear to have been the Court's view that that portion of said finding reading "fixed by means of an arbitrary differential" should have compelled the Board to conclude that the indicated differential was "arbitrary", in the sense of effect, and hence unreasonable (as against whose interest cannot be figured out); instead of a mere handy means of indicating a difference. The differential might well have been more or less (it was a usual and not capricious figure) without affecting anybody's rights. "Arbitrary" was mere surplusage.

It may well be doubted that even Isbrandtsen intended to attach to this finding No. 14 any such significance. More likely counsel merely put it forward as a factual statement relating to the Conference lines' notices to shippers, the pertinent part of one of which reads (Ex. 1-K, R. 37, 278-9): "It is the intention in the near future to apply the tariff freights now in force as contract freights and to fix tariff freights (non-contract rates), which will be abt. 20% higher."

The non-contract rates, specifically set forth in the tariff, were arrived at by rounding out to the nearest five cents a 20% increase over the basic contract rates (R. 861). If the mere self-apparent difference between the two sets of rates could constitute unlawful discrimination under the statute, as contended by Isbrandtsen and asserted by the Court below, there could have been no occasion for "full hearing" and the Court's original order for an adversary proceeding. As this Court commented in *North Carolina* v. *United States*, 325 U. S. 507, 512:

> "If Congress intended to permit such an oversimplified form of proof to establish 'unjust discrimination', then its requirement of a 'full hearing' was mere surplusage."

"Arbitrary" as used in rate making is a word of art, neither meaning nor implying discrimination. It is usual in both land and ocean rate-making to apply what are termed "arbitraries" to basic rates to cover particular situations. An example is the Shipping Board's decision in *Everett Chamber of Commerce, et al.* v. *Luckenbach S. S. Co. et al.*, 1 U. S. M. C. 149, where it was specifically found that such an "arbitrary" was not discriminatory or in violation of the statute. See *United States* v. *Illinois Central Railroad*, 263 U. S. 515, 523, *Baltimore & Ohio R. Co.* v. *U. S.*, 298 U. S. 349, 361.

The 20% differential was the percentage referred to in at least three cases before the Maritime Commission or its predecessor. *Contract Routing Restrictions*, 2 U. S. M. C. 220; *Cargo to Adriatic, Black Sea and Levant Ports*, 2 U. S. M. C. 342; *Phelps Bros. Inc.* v. *Cosulich-Societa, etc.*, 1 U. S. M. C. 634. In the *Phelps Bros.* case the Commission said (p. 638):

> "It is not shown that the non-contract rate on its shipments or any other commodity is unreasonable or that the contracts operate to the detriment of its business or commerce in general."

Of the exclusive patronage system the Commission said (p. 639):

> "We find, therefore, that the allegation that defendants have established and are maintaining a system of exclusive patronage contracts under agreements or understandings not filed or approved pursuant to section 15 has not been sustained, and that defendants' conference agreement and contracts with shippers entered into pursuant thereto have not been shown to result in undue or unreasonable preference or advantage to shippers who patronize defendants' lines exclusively or to operate to the detriment of the commerce of the United States."

The contract rate practice with this specific differential, having been in effect for many years, and having previ-

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ously met with administrative approval, was entitled to be presumed reasonable. *Copper River Packing Company* v. *Alaska S. S. Co.*, 22 F. 2d 12, 14 (9 Cir., 1927); *Interstate Commerce Commission* v. *Chicago Great Western Railway Co.*, 209 U. S. 108, 119-20; *American Railway Express Company* v. *Lindenburg*, 260 U. S. 584, 589.

As the Examiner indicated in his supplemental report, the assurance of a steady flow of traffic aided by the contract-rate system permits the quoting of lower rates and provides appropriate consideration to the carrier (R. 242). The situation has obvious analogies in round-trip tickets, excursion tickets, commutation tickets and party-rate tickets—matters of everyday usage in railroad or steamship practice, notwithstanding the fact that different persons may superficially appear to be enjoying precisely the same service at different rates. This was all thoroughly discussed in *Interstate Commerce Commission* v. *B. & O. Railroad*, 145 U. S. 263, where party rate tickets were under consideration. The discussion there at pp. 276-80 is most pertinent.

The same considerations apply to air travel. See *Air Passenger Tariff Discount Investigation*, 3 C. A. B. 242, where the Civil Aeronautics Board approved an agreement between carriers allowing a discount of 15% to any individual using a minimum of $300. worth of transportation per calendar year on condition of depositing $425 with the issuing carrier.

The findings and conclusions of the trial Examiner and of the Board itself should be considered in the light of this well settled and understood background.

The question before the Maritime Commission, the Federal Maritime Board, and the District Court was whether the proposed contract rate system, whatever the differential might be and however arrived at, violated any standards set forth in the Shipping Act. That Act concerns itself with effects and consequences and not methods. In

evaluating the numerous factors which lie behind the broad criteria set forth in the Act, both the trial Examiner and the Board found in favor of the appellants' position. The agency making any determination of such questions as are here involved must consider the broad statutory objectives when reaching its ultimate conclusions. *North Carolina* v. *United States,* 325 U. S. 507, 512, 514-15. That determination must be upon the record as a whole. *Alabama Great Southern R. R. Co.* v. *U. S.,* 340 U. S. 216, 225-26. The weight to be attributed to the facts proven and the inferences to be drawn from them are for the administrative agency to determine and not the courts. *Corn Products Co.* v. *Federal Trade Commission,* 324 U. S. 726, 739; *National Labor Relations Board* v. *Greyhound Lines,* 303 U. S. 261, 270; *National Labor Relations Board* v. *Southern Bell Telephone & Telegraph Co.,* 319 U. S. 50, 60.

The important policy decision which the Board is called upon to make cannot be arrived at on the basis of any compressed or narrow interpretation of a mere fragment of the testimony. Reference was made in the Court's opinion to certain testimony of Conference Chairman Andrews as supporting the Court's views on the impropriety of the differential. As the principal proponent of the conference rate system it could scarcely be expected that Mr. Andrews would be testifying as to the impropriety of such rates, and he did not do so. He explained in some detail the care and consideration which went into the making of Conference rates (R. 611-12, 872) and stated that he considered the basic tariff reasonable (R. 756). He did distinguish and denounce Isbrandtsen's system of making rates by "tagging" them at a figure a given percentage below those of its competitors over which it had no control (R. 724). This denunciation was nothing more than, and corresponded to, that expressed by the Maritime Commission in *Cargo to Adriatic, Black Sea and Levant Ports,* 2 U. S. M. C. 342. The condemnation obviously rests on the fact that Isbrandtsen's rates, unlike those of the conferences, are fixed on the basis of undercutting other carriers by a percentage

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instead of independently upon its own consideration of business or economic factors which should affect and determine its basic rates.

The Examiner obviously understood the testimony of Andrews in the above sense, which excluded the distorted significance attached by the Court.

The Court below through its interpretation of this testimony did what was denounced in *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73, in making "its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences." See also *Federal Trade Commission* v. *Education Society*, 302 U. S. 112, 117.

Wherever consistent and possible, the court should adopt a construction which does not invalidate the Board's order. *Baltimore & Ohio Railroad Co.* v. *United States, et al.*, 304 U. S. 58, 60; *National Labor Relations Board* v. *Hudson Motor Car Co.*, 136 F. 2d 385, 387 (6 Cir., 1943); *National Labor Relations Board* v. *George Pilling & Son Co.*, 119 F. 2d 32, 33 (3 Cir., 1941); *Chicago, M., St. P., & P. R. Co.* v. *United States*, 33 F. 2d 583, 586, aff'd 282 U. S. 311.

Even if it could be said that the Examiner's reference to "arbitrary differential" (R. 258) produced ambiguity as between the Examiner and the Board (which is surely not the case); and even if the Court deemed that of vital importance, it was nevertheless not the Court's prerogative to resolve any such imputed ambiguity; rather its duty would be to send the matter back to the agency for its clarification. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 197; *National Labor Relations Board* v. *Service Trade Local 145*, 191 F. 2d 65, 68 (2 Cir., 1951); *National Labor Relations Board* v. *Don Juan Inc.*, 178 F. 2d 625, 627 (2 Cir., 1949).

The Board moved the Court February 20, 1951 to reconsider its decision, and to order the proceeding remanded to the Board for further proceedings there. Appellants

also moved the Court for reconsideration (R. 117). The Court denied both these motions by order dated March 20, 1951 (R. 149-150).

The Board's decision of December 1, 1950 does not contain any language that would support any idea of ambiguity; nor suggest that the Board's views contradicted or diverged from those of the Examiner. The Board stated (R. 53): "With the examiner's recommendations, we generally agree." The Board did not agree with Conclusion 3 of the Examiner (R. 254) but held that what he had called a "penalty" was "liquidated damages" (R. 65-66).

The recommendations referred to by the Board were that in the Examiner's first report to effect that the contract system did not violate Sec. 14 (3) of the Shipping Act (R. 224); also those in his supplemental report to effect that the system did not violate the Act or contravene Sec. 15 thereof, and that the particular contracts proposed to be used were not unlawful—except in a minor respect which purported to authorize discrimination by carriers concerning shipper violations (R. 254). The contract form correction which the Board made a condition of its decision and order of December 1, 1950 (R. 66-67) was made immediately by appellants and notified by them to the Board December 6, 1950 (R. 44).

The Board's report contained full, complete and analytical discussion of the several items comprehended within the Examiner's two reports and recommendations, and no nook or cranny was left open to admit light or color for any suggestion of ambiguity as between the Examiner and the Board as imputed by the Court. The Board itself stated that the Examiner's findings were "a substantial compliance with the orders of reference" (R. 66). That statement should be deemed conclusive. Comment otherwise could be only harmless surplusage. The decision in such a case as this, where the Examiner's report has been tested by exceptions and by full argument and review thereof, is in

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every respect the decision of the Board and in no sense that of the Examiner.

During the argument December 20, 1950, the Court put to the Solicitor for the Maritime Board a question whether the Board had adopted the "findings" of the Examiner. To this the Solicitor replied: "In so far as not inconsistent with its own report. In general it accepted them." (R. 75).

That question would now appear to have been designed to bring into prominent focus Finding No. 14 (R. 258) containing the phrase "arbitrary differential." The above answer given by the Solicitor was in every respect correct. Nevertheless the Court would appear to have somehow sought to expand the same into an "admission" by Board counsel upon which to formulate its decision in respect of "arbitrary."

The Board did not "in precise terms adopt this finding," said the Court (R. 124). Nor was there any other formal type of adoption, and such was not necessary. Neither the Examiner nor the Board drew any inference from said finding; no inference was invited thereby. The discussion by the Examiner in his two reports, also by the Board in its decision, demonstrates that said finding was nothing more than an historical description of a necessary characteristic of the contract-rate system (percentage difference) without other significance.

If said finding could be imagined to have had significance by way of inconsistency, that would have been completely displaced by the Board's report.

The Court's decision can not rest upon whether or not the Board *adopted* said finding 14. It rests rather only upon an *inference*, which only the Court itself saw fit to draw from said finding. This was done notwithstanding that neither the Examiner nor the Board had drawn such an inference, and any such inference was thereby foreclosed. The "finding" had indeed been rather boldly phrased by complainant when we consider the documents on which

alone it was based. These scarcely justify the turmoil raised by the Court. See Ex. D and Ex. E annexed to the complaint (R. 31-38).

In this situation, as in *Interstate Commerce Commission* v. *United States*, 289 U. S. 385, 393, the Court flew into the face of a "difficulty that the Commission did not think the inference permissible and so declined to make it." The Court was not at liberty to distort finding 14 into a conclusion of legal effect in place of mere description. Its action was unwarranted either in logic or in law, and had no basis in essential fact.

POINT IV

The narrow ground of the Court's decision left wholly unsupported Isbrandtsen's contention against statutory authority of the Board to approve the contract rate system here involved. That authority is clear under Sec. 15 of the Shipping Act and was not restricted here by Sec. 14 or any other section of said Act.

Frank, C. J., said:

> "For the purposes of this decision, we shall assume that, as the Board contends, in some circumstances the Board may, pursuant to 46 U. S. C. Sec. 814 [Shipping Act, Sec. 15], approve a conference agreement containing such a provision" (R. 120).

This language followed immediately his casting to one side the ground on which Isbrandtsen had based its suit:

> "The plaintiff, the Attorney General, and the Secretary of Agriculture contend that in no circumstances can a dual-rate provision (i.e., an exclusive patronage, or dual-rate, or contract-noncontract provision) in a conference agreement be valid under 46 U. S. C. Sec. 812, Third [Shipping Act, Sec. 14]. We need not, and do not, decide whether or not that contention is sound" (R. 119-120).

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Contract rates in the foreign trade have commonly been sustained by the agency administering the Shipping Act. Examples are: *W. T. Rawleigh Co.* v. *N. V. Stoomvaart Mij. Nederland, et al.*, 1 U. S. M. C. 285; *Atlantic Refining Company* v. *Ellerman and Bucknall S. S. Co.*, 1 U. S. M. C. 242; *Phelps Bros. & Co., Inc.* v. *Cosulich-Societa, etc.*, 1 U. S. M. C. 634; *Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11; *Himala International* v. *American Export Lines, Inc., et al.*, 3 U. S. M. C. 232. The Shipping Board in November 1926 in its Docket *Ex-Parte* 5 had on its own motion instituted a contract-rate investigation. The whole matter was then fully aired. The Board closed that investigation without making any adverse order. This amounted to approval as of 1926, in advance of the approvals evidenced by the foregoing decisions.

Isbrandtsen has on occasion availed of the contract-rate system as appears from the Board's report (R. 59):

> "It may be noted in passing that complainant's predecessor corporation, Isbrandtsen-Moller, adopted for itself an exclusive patronage dual rate system from 1937 to 1939 and filed 176 dual rates with the Maritime Commission, thus apparently at that time agreeing with the Commission's interpretation of the law."

Its Vice President Crinkley testified to the use and purpose (R. 376-78).

In view of the long use of the contract rate system as shown by the foregoing decisions, the Court would appear to have thought that it was rather late in the day to strike down contract rates as matter of law, as contended for by Isbrandtsen, and that it was enough for the present case to say that the differential was "arbitrary". We believe that enough has been said already to dispose of the validity of that basis for the decision. If in this we are correct, the legal result is that the Board's Report and Order of December 1, 1950 ought to be deemed correct, and that said order must be reinstated.

The original complaint asked that the Commission's 1948 approvals of the Conference agreements be set aside. The amended complaint added the further request that the Board's December 1, 1950 order dismissing Isbrandtsen's complaint before it be likewise set aside. The Court set aside the December 1, 1950 order *but did not set aside* the original approval orders, doubtless because it had not sustained the basic and indeed only contention made by the complaint.

Nevertheless for possible aid to this Court in respect of the whole background, it appears to be in order that we should now deal with a few general features of the whole situation.

1. Concerning Suggestion of Monopoly

Sec. 15 is designed to place inter-carrier agreements under administrative control, not only as to original approvals, but also as to modifications, cancellations, etc.; and during the pendency of agreements thus controlled and supervised to relieve the coöperating carriers from the restrictive applications and effects of the anti-trust statutes. These considerations, established by Congress for public agency control over restraints, make academic and put to one side arguments whether by courts or by counsel against "monopoly" in our foreign maritime commerce.* The

* That the Court's reception of arguments based on Sec. 15 and interest in the commerce of the country, etc. was somewhat less than cordial is suggested by the colloquy between Court and counsel December 20, 1950 (R. 93-4). Frank, C. J., intimated that counsel was indulging in "shadow-boxing", "mockery" and "boastful talk". Further, "I would ask you to desist. I don't care to hear it". * * * "I am not interested in your opinion of what is good for the welfare of the country". A rather similar attitude had appeared at the original hearing November 3, 1948 when, according to the Court Stenographer's minutes, at pp. 68-69, the following colloquy took place:

"Judge Frank: Just a minute. Would not the Anti-trust Division of the United States, if they were on the

(Footnote continued on following page)

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matter was well put by the Examiner in his supplemental report, to effect that a true monopoly in the ocean trades is impossible (R. 236).

Enlightened and realistic administrative controls find expression in many statutes exempting beneficent coöperation from the anti-trust laws. Sec. 15 also applies to various agreements which would not be subject to the anti-trust laws. See 22 Mich. L. Rev. 107 on "Shipping Act 1916, The Effect of Section 15 on The Sherman Anti-Trust Law".

Among analogous situations are:

1. *Railroads*—49 U. S. C. 5 (Transportation Act of 1920); 62 Stat. 472, 49 U. S. C. 5b (9) (Reed-Bulwinkle Act). See *United States* v. *Southern Pacific Co.*, 290

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job, come right down on you tomorrow morning and would you even think of defending it if it were not for the statute that you are relying upon?

Mr. Hupper: I have no knowledge of what the Antitrust Division would do and I know nothing as to what the provisions of law are as to those matters. I am talking about foreign shipping——

Judge Frank: Yes, sir; and Judge Rifkind and I are both trying to get to this point: that we do not want to be treated as if we were simpletons, and I think I can speak for all three of us: that unless you can bring this within the statute in some way, which is really the whole point of this discussion, that this is an unlawful agreement because it is deliberately designed to do what the antitrust laws say you must not do.

Mr. Hupper: Not at all.

Judge Frank: If there is something in this statute which says you may, that is what we want to hear. I think it would take several years of argument that you were not violating the antitrust laws if it were not for the statute.

Mr. Hupper: I must be guided by the statute. Section 15 of the Shipping Act says that these cooperative agreements between carriers are subject to the approval of the Maritime Commission, which must give its approval unless it finds they are contrary to the public interest, and when so approved they are exempt from the provisions of the Sherman Antitrust Act. That is specific."

Fed. 443 (D. Utah, 1923). See also 48 Stat. 217 et seq. 49 U. S. C. 251-268 (Emergency Transportation Act, now expired).

2. *Motor Carriers*—54 Stat. 908, 49 U. S. C. 5 (11). See Motor Carrier Act (August 9, 1935) 49 Stat. 557, repealed 54 Stat. 924. See also *McLean Trucking Co.* v. *United States*, 321 U. S. 67; "The Changing Pattern of Federal Regulation" in Progress Report, Senate Committee on Interstate and Foreign Commerce, S. Rep. No. 1039, 82nd Cong., 1st Sess., pp. 4-8 (1951).

3. *Interstate Water Carriers*—54 Stat. 908, 49 U. S. C. 5 (11); 54 Stat. 929, 931, 49 U. S. C. 902-3.

4. *Airlines*—52 Stat. 1001, 1004, 49 U. S. C. 488, 494 (Civil Aeronautics Act). See *S. S. W. Inc.* v. *Air Transp. Ass'n. of America*, 191 F. 2d 658, 663 (Ct. App. D. C.).

5. *Agricultural Combinations*—61 Stat. 208, 7 U. S. C. 608b. See *United States* v. *Rock Royal Co-Op.*, 307 U. S. 533, 560.

6. *Coal Marketing Agreements*—50 Stat. 88 (Bituminous Coal Act, now expired).

The propriety of such objectives is manifest from *Nebbia* v. *New York*, 291 U. S. 502, 538, where Mr. Justice Cardozo said:

> "If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten immediately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public."

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Neither are the proscriptions of the anti-trust laws immutable. Mr. Justice Douglas said in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 396:

> "Certainly what Congress has forbidden by the Sherman Act it can modify. It may do so by placing the machinery of price-fixing in the hands of public agencies. It may single out for separate treatment, as it has done on various occasions, a particular industry and thereby remove the penalties of the Sherman Act as respects it. Congress under the commerce clause is not impotent to deal with what it may consider to be dire consequences of laissez-faire. It is not powerless to take steps in mitigation of what in its judgment are abuses of cut-throat competition. And it is not limited in its choice between unrestrained self-regulation on the one hand and rigid prohibitions on the other."

The situation here is broadly analogous to that dealt with by the District of Columbia Court of Appeals in *Maryland & Virginia Milk Producers Association, Inc.*, v. *United States*, (November 8, 1951), —— F. 2d ——, 20 U. S. Law Week 2185. There the Court refused to hold unlawful under the Sherman Act full supply contracts requiring milk distributors to buy their supply exclusively from the producers' association whenever the association could supply it, with an arrangement for different prices according to the intended use of the product.

Neither the complaint nor amended complaint charge violation of the anti-trust laws. Nor did the attorney for the Department of Justice (R. 265-6). At the original hearing in the District Court the Department of Justice stood aside. 81 F. Supp. at 545. The intervention of said Department before the Commission was subject to its Rule that the issues as between the original parties would not thereby be broadened. The decision by the Board, also that of the Court, contains nothing appertaining to the anti-trust functions of the Department of Justice. It should not be permitted to make a happy hunting ground out of this litigation. Yet we have here the anomaly of the De-

partment of Justice being permitted to attack freight-rate practices under approved agreements that another branch of the Government is defending under a law submitted to its administration.

As the trial Examiner noted (R. 236) the Conference system is not "monopolistic" in any ordinary sense. The Conference carriers were not seeking to dispense with the competition of Isbrandtsen, or that of any non-Conference carrier. That would in any sense have been futile. They were merely seeking to protect and preserve the rate levels which they had agreed upon, and to provide reasonable stability, desired by most shippers. Isbrandtsen, like any other carrier, could have come into the Conferences upon equal terms and provided full competition in service but under the same rules which other carriers found acceptable and reasonable. The American lines had a majority of the sailings in the Conferences (R. 600-602).

The Shipping Board in *Rawleigh Co.* v. *N. V. Stoomvart Mij. Nederland, et al.*, 1 U. S. M. C. 285 at p. 290, distinguished its earlier decision in *Eden Mining Co., et al.* v. *Bluefields Fruit & Steamship Co.*, 1 U. S. M. C. 41, on the basis that in the earlier case a single carrier had sought to monopolize the trade by preventing the use of any other carrier, whereas in the *Rawleigh* case, as here, shippers could use any one of a group of carriers with the opportunity to other carriers to join the Conferences.

Even under the Sherman Act a legitimate economic objective is an important aid in the interpretation of facts and the prediction of consequences. In *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, this Court refused to hold invalid under the Sherman Act an association of coal producers (controlling 73% of the production of the area) which was formed as a joint selling agent with authority to fix prices. This Court there said (p. 372):

> "The industry was in distress. It suffered from over-expansion and from a serious relative decline through the growing use of substitute fuels. It was

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> afflicted by injurious practices within itself,—practices which demanded correction. If evil conditions could not be entirely cured, they at least might be alleviated. The unfortunate state of the industry would not justify any attempt unduly to restrain competition or to monopolize, but the existing situation prompted defendants to make, and the statute did not preclude them from making, an honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce. The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry. So far as actual purposes are concerned, the conclusion of the court below was amply supported that defendants were engaged in a fair and open endeavor to aid the industry in a measurable recovery from its plight."

The Conference system buttressed with contract rates tends to establish uniform rate levels. That is its avowed and beneficial objective. In respect of land carriers and public utilities, etc., that is likewise the purpose of the various statutes affecting them. It would now be unthinkable for a person to pay one fare for transportation between New York and Chicago on one railroad and a different fare on another. Where this objective so eagerly sought after by the shipping and travelling public can be secured by governmental regulation it has been done. Where because of international complexities the equalization of rates cannot be dealt with directly by governments, it cannot be objectionable that the same objective is being fairly well accomplished indirectly by coöperative effort under governmental supervision.

Any danger of monopoly in the shipping industry does not result from the Conferences, but rather from uncontrolled, unrestricted competition. This was the observation of the Alexander Committee when it said (Vol. 4, p. 295) that Conference agreements "are held to furnish the

means for taking care of the disabilities of the weaker lines, whereas unrestricted competition based upon the survival of the fittest tends to restrict the development of the lines and in the end must result in monopoly." See also MERCHANT MARINE STUDY AND INVESTIGATION, S. Rep. No. 2494, 81st Cong., 2nd Sess., pp. 84-86 (1950).

2. Concerning Suggestion of Prejudice to Other Interests

The contention that the contract rate system permits the Conferences to exclude independents from the trade—as if the Conferences had the power to issue or to withhold certificates of convenience, etc.—is without substance. The Board said: "there is no evidence that the dual rate system has in the past, or will in the future, effectively cause the exclusion of an independent carrier from any trade route on which he wishes to operate." (R. 62-3).

Admission of applying steamship lines to Conferences is provided for in the Conference agreements and does not lie in the sole control of the Conferences themselves. Conferences are always under the supervision and control of the Federal Maritime Board. Their very existence depends upon its continued approval, and unlawful action invites disapproval. In many decisions the administrative agency has established the rules concerning admission of applying lines. See *Sprague Steamship Agency* v. *A/S Ivarans Rederi*, 2 U. S. M. C. 72; *Hind, Rolph & Co., Inc.* v. *French Line*, 2 U. S. M. C. 138; *Waterman S. S. Corp.* v. *Arnold Bernstein Line*, 2 U. S. M. C. 238; *Cosmopolitan Shipping Company, Inc.* v. *Black Diamond Lines, Inc.*, 2 U. S. M. C. 321; *Sigfried Olsen* v. *Blue Star Line, Limited*, 2 U. S. M. C. 529; *The East Asiatic Company, Ltd.* v. *Swedish American Line*, 3 U. S. M. C. 1; *Phelps Bros. & Co., Inc.* v. *Cosulich-Societa, etc.*, 1 U. S. M. C. 634. *Application of Red Star Line for Conference Membership*, 1 U. S. M. C. 504; *Application of G. B. Thorden for Conference Membership*, 2 U. S. M. C. 77; *Agreement No. 7620*, 2 U. S. M. C. 749; *Seas Shipping Co.* v. *American South African Line, Inc., et al.*,

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1 U. S. M. C. 568; *Wessel, Duval & Co.* v. *Colombian S. S. Co., et al.*, 1 U. S. M. C. 390; *American Caribbean Line* v. *Comp. Gen. Transatlantique, et al.*, 1 U. S. M. C. 549; *Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11.

Although the Board is without power to prescribe specific "maximum" or "reasonable" rates, it does not follow (as Frank, C. J. suggests in his "Appendix") that foreign trade carriers can write a blank check as to their own rates and practices (R. 139). Apart from the common law obligations to charge reasonable rates, carriers (whether Conference members or independents) are always subject to the limitations and prohibitions of Sec. 14 and other sections of the Act. Furthermore, when the carriers avail themselves of the permitted benefits of Sec. 15, they also subject themselves to a degree of control which could not be readily exercised against them as individual competing carriers. Thus has the power to approve, disapprove, cancel or modify agreements become the cornerstone of governmental regulation of carriers in the foreign trade. That such regulation has in fact been and still can be exercised in respect of Conference rates is shown by the decision in *Edmond Weil* v. *Italian Line "Italia"*, 1 U. S. M. C. 395, where the Secretary of Commerce made clear (p. 398) that unless the Conference carriers conformed to the agency's determination their agreement would be disapproved:

> "In this instance, however, the rate under attack was fixed by a group of carriers acting in conference relationship under an agreement which is lawful only when, and as long as, approved by this Department under authority of section 15 of the Shipping Act. An unreasonably high rate is clearly detrimental to the commerce of the United States, and upon a showing that a conference rate in foreign commerce is unreasonably high the Department will require its reduction to a proper level. If necessary, approval of the conference agreement will be withdrawn."

Contentions about maximum rates, and certificates of convenience and necessity, overlook the distinction between regulatory provisions covering foreign trade carriers and land regulations covering railroad fares and charges, public utility rates, etc.—where the rate levels, etc. are related to matters of investment, valuation, reasonable return, etc. Such precise standards can scarcely be applied to shipping at all, and certainly not to foreign waterborne commerce where international competition and potential regulation and controls by countries of origin, destination and varying national ownership and flag must always be taken into consideration—and often most thoughtfully and tenderly dealt with.

These considerations greatly restrict and limit the permissible impact of regulation (either by our country or others) upon ocean rate practices and levels. It is only when rates or practices of the carriers appear to violate specific statutory proscriptions as set forth in the Shipping Act of 1916, that questions arise for administrative determination. The area for ocean carrier determination of rates and practices is necessarily much broader than in land operation. This very fact makes potential competition between the ocean carriers much keener and far more destructive in result while the advantages of intercarrier self-regulation become correspondingly more certain and apparent. See MERCHANT MARINE STUDY AND INVESTIGATION, S. Rep. No. 2494, 81st Congress, 2d Sess., pp. 84-86 (1950).

The distinction between foreign trade rates and domestic rates in respect of control and regulation was apparent to this Court in the *Swayne & Hoyt* case, 300 U. S. 297. It is fully dealt with in the decision of the Secretary of Commerce in *Gulf Intercoastal Contract Rates*, 1 U. S. M. C. 524, the decision under review in the *Swayne & Hoyt* case. The reasoning of the agency there was indeed the reverse of that of Frank, C. J. (R. 83-4, 139). It emphasized that where the Board did have direct control of *inter-*

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coastal rate levels there was no occasion for the contract rate system—approved here by the Board for the *foreign* trade. 1 U. S. M. C. at 529.

In our international maritime trade, beset as it is with constantly changing problems, competitive considerations and national aspirations as between the carriers of many independent nations, most of which are naturally and absolutely beyond control or regulation by any single country, it is obvious that controls and regulations appropriate to our domestic carrier trades—such as railroads, trucking, etc.,—could not reasonably be applied; and that any attempt to apply them would quickly produce complications and failure. For such reasons the Shipping Act was established on broad lines with great elasticity as concerned international coöperation and forbearance, well known to be necessary, so that its supervisory and regulatory purposes should not fail.

It was well known by Congress that "monopoly" to some extent (if it be monopoly to take steps for self preservation) must be recognized and tolerated, subject always to supervision and control in the public interest by an informed and competent administrative agency — first known as the Shipping Board and now Federal Maritime Board. "Monopoly" is heavily overworked. In our shipping trades many coöperative agreements and practices when intelligently understood do not savor of monopoly at all.

We note also the comparable situation in international air transportation under the Civil Aeronautics Act (52 Stat. 1001, 1004, 49 U. S. C. 488, 492, 494) alluded to by the Civil Aeronautics Board in Order E-5623, adopted August 17, 1951:

> "It must be remembered that I. A. T. A. is an organization of air carriers of many countries with varying national interests and differing concepts of transportation principles. It is obvious that such an organization cannot function without a degree of

> mutual accommodation. If each government involved were to withhold approval of any agreement which did not in every way measure up to that government's conception of national interest and proper transportation principles, no agreement could ever be reached."

The indicated, indeed dictated, guide is mutual accommodation—in respect of which it may truly be said that the Shipping Act was well designed; and that its administration has on the whole been reasonable and helpful to our own maritime commerce and not prejudicial to that of other nations.

The true philosophy and sense of the matter as concerns immediate use of the contract-rate system was especially well put by the Examiner in his supplemental report (R. 253):

> "Whether the system is in contravention of section 15 or in violation of sections 16 or 17 of the Act rests in the sound administrative discretion of the Commission. *U. S. Navigation Co.* v. *Cunard S. S. Co., Ltd.*, 284 U. S. 474, 485. There must be a weighing of interests and a balancing of the equities. That the system does restrict complainant's operations and prevents shippers from using any carrier they please cannot be denied, but the Commission must not shut its eyes to realities. The conference system is sapped of its vitality if there be no method of binding the majority of shippers in the trade. Without the contract system, or some other effective means, the life of a conference would be short in the face of rate manipulations by independent lines or the influx of tramp vessels. Respondents cannot be expected to put off the use of the system until trouble actually brews in the trade, for rate wars completely demoralize commerce and all interests suffer needlessly. The possibility of unrest in foreign shipping is even more pronounced today in view of the quest by foreign-flag lines for United States dollars. Surely the Commission should use every means at its disposal to prevent a breakdown of international trade, and any plan utilized by respondents to forestall instability should be upheld unless it is clearly

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opposed to a postive rule of law. The following statement by Justice Brandeis in *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, 149, is apposite to the present discussion:

> 'It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice.' "

3. Concerning Suggestion of Unconstitutionality

Isbrandtsen's faint suggestions against constitutionality (R. 7) were not sustained by the Court below. An earlier attack by Isbrandtsen against another feature of the Shipping Act on constitutional grounds was disposed of by this Court in *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, affirming 14 F. Supp. 407.

In the Shipping Act, 1916 the *criteria* are detailed, clear and positive for approval of agreements initiated by the coöperating parties and their exemption from the anti-trust laws. See *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 399-400. These *criteria* provide adequate standards for administrative action so that no basis exists for charging unlawful delegation of power. *Lichter* v. *United States,* 334 U. S. 742, 784; *American Power Co.* v. *S. E. C.,* 329 U. S. 90, 104-106; *N. Y. Central Securities Co.* v. *United States,* 287 U. S. 12, 24-25.

The *Schechter* case, 295 U. S. 495, is not to the contrary. There the National Industrial Recovery Act was held unconstitutional because of unlawful delegation of power to determine what was "fair competition", a concept not defined by the Act itself. That Act dispensed with the administrative procedure provided for in the Federal Trade Commission Act (38 Stat. 717, 719, 720) which included the expression "unfair methods of competition", to be determined on evidence in particular instances in the light of competitive conditions by a Commission created to find specific and substantial public interests. The Shipping Act definitely provides for such administrative

determination, and such was duly had in respect of the contracts presently under consideration.

4. Concerning Alexander Committee Objectives

The Alexander Committee was deeply concerned with the disastrous effects of rate wars which had been so destructive of stability in rates and services (Vol. 4, 295-303). After summarizing the advantages of agreements and Conferences the Committee concluded (416-417):

> "These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition cannot be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors."

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The last ten lines of this quotation reflect a most important fact, i.e. that the maritime commerce of the entire world is conducted under the Conference system, irrespective of particular countries—so that our own merchants and shippers have a special interest in the Conference system and its usual practices.

The Committee was well aware of contract rate agreements. The Report says (Vol. 4, 290):

> "(a) *Joint contracts made by the conference as a whole.*—Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i.e. are willing at all times to contract with all shippers on the same terms."

Abuses found and recommended against by the Committee did not include agreements for contract rates. They should be regarded as having been approved by the Committee. Such has generally been the view of the administrative agency. Failure to outlaw commonly implies approval. A recent example is *Maryland & Virginia Milk Producers Assn., Inc.* v. *United States*, —— F. 2d ——, 20 Law Week 2185, November 8, 1951, wherein the District of Columbia Court of Appeals said:

> "Had Congress intended to forbid the use of the classification pricing plan except under a Federal Marketing Order, doubtless it would have so provided. But it did not."

Stabilization of rates and practices was a principal objective contemplated by the Alexander Committee to be

accomplished by Conferences on inter-carrier agreements to be approved by the supervising agency. Charging of the specified contract rates set forth in the tariffs is a rate practice of the carriers in furtherance of the basic agreements. The same may be said of the specified non-contract rates. In this case the inter-carrier agreements approved by the agency specifically provided for contract rates. Issuance of the contract forms to shippers for their signature is the means of implementing the Commission approved freight rate practice.

Concerning Bearing of Section 14

Isbrandtsen's attack was principally based on the prohibition in Sec. 14, Third, of the Shipping Act, which reads:

> "Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

In this approach Isbrandtsen has disregarded the obvious purpose and whole framework of the Shipping Act; failing to recognize the clear division between Sec. 15, which deals specifically with agreements between carriers, and the various other Sections of the Act which are directed particularly to the rights and protection of shippers, et al. These several broad statutory protections contemplate constant supervision and appropriate corrective action by the Board at the instance of any aggrieved party.

Under Sec. 15 itself full power is reserved to the Board to cancel Conference agreements and other agreements that may be found prejudicial to shippers or the public, notwithstanding prior approvals. The supervisory functions of the Board may be exerted upon the Board's own motion, or upon complaint of any affected party, under Sec. 22 or other Section of the Act—or even informally. Isbrandt-

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sen's complaint in the present case resulted in complete review of the earlier approvals of the contract rate practice, and of the contract forms used. In view of the satisfactory way the contract-rate system has worked heretofore as shown by the decisions, it was highly inappropriate for the Court to indulge in advance speculation against its usefulness in the future. *Securities and Exchange Commission* v. *Central-Illinois Corp.*, 338 U. S. 96, 126-7. The Examiner said (R. 242):

> "If it should develop that the conference rates are detrimental to the commerce of the United States, the Commission has full authority to rectify the situation by disapproving the conference agreement unless the rates are changed."

The Examiner said further (R. 253):

> "The Commission is being asked to declare unlawful a practice not yet in existence. To outlaw the contract system without permitting respondents to try it out—unless the practice is unlawful *per se*, which it is not—would be dangerous. This being an adversary proceeding, the burden is upon complainant and its supporting interveners to convince the Commission of the undesirability of the system in the trade under consideration. The burden has not been met."

Against the argument made that contract rates are prohibited by Sec. 14, it clearly appears therefrom that subsec. first covers deferred rebates, subsec. second fighting ships, subsec. third retaliations, and subsec. fourth certain unjust discriminations in dealings as between shippers, including "any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered."

The contract rate practice does not qualify for this condemnation; the small shipper and large shipper are treated alike in rates, as well as in service. The deferred rebate prohibited by Sec. 14 (1) may not properly be confused with the contract rate practice. There was no such

confusion in the minds of the Alexander Committee which referred to the deferred rebate system as follows (Vol. 4, 307):

> "By deferring the payment of the rebate until three or six months following the period to which the rebate applies ship owners effectively tie the merchants to a group of lines for successive periods. In this connection it is argued that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system."

The distinction was also clarified in *Ambler* v. *Bloedel Donovan Lumber Mills*, 68 F. 2d 268 (9 Cir., 1933), where it had been argued, as here, that a contract rate to a shipper constituted a rebate. The Court there said at p. 271:

> "The shipper was to pay the $8 per thousand on lumber stored. If the carrier collected $10 per thousand on such part of the cargo sold, it did not pay the $2 to the shipper as a refund, for it was charged but $8, the remainder of $2 being applied to the balance of freight due. This was no rebate or refund as these terms are commonly understood.
>
> Neither can there be said to have been a concealment. The only other large shipper on the Cedar and the Oak received a like rate. * * *
>
> * * * * *
>
> "In the case here there was no concealment as forbidden by statute; a competitor was given the same rate as the Bloedel Donovan Lumber Mills. There was no showing of unfairness, nor of unreasonableness of rate, in view of the prevailing conditions and the fact that the carrier's vessels were desperately in need of east-bound tonnage. The contents were known to all who cared to inquire."

See also Learned Hand, C. J. in *Prince Line* v. *American Paper Exports, Inc.*, 55 F. 2d 1053, 1055 (2 Cir., 1932):

> "The law did not forbid all concessions to a shipper; apparently it assumed that if these were above

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> board, and known or ascertainable by competitors, the resulting jealousies and pressure upon the carrier would be corrective enough. But it did forbid the carrier to grant such favors, when accompanied by any concealment, and its command in that event was as absolute as though it had been unconditional."

The term "fighting ship" as used in Sec. 14 (2) is so unlike anything in the contract rate system as to forbid any discussion of that item.

Sec. 14 (3) was obviously enacted pursuant to the Alexander Committee's recommendation against retaliations. There can be no question here of "retaliation". The contract rates are open to all shippers irrespective of previous patronage of other carriers. The liquidated damage provision in the contract forms, mentioned in passing in Judge Frank's "Appendix" (R. 146) does not affect this observation. With a slight modification (accepted by the carriers) this provision for damages was sustained by the Board.

Undue emphasis has been placed upon the omission of an adverb (e.g. unjustly) before the word "discriminating" in Sec. 14 (3). It surely would be unreasonable to mandate the Board under Sec. 15 to approve agreements which were not "unjustly discriminatory" and to eliminate that authority because of variation of language in Sec. 14 (3). No such self-defeating could have been intended. Statutory construction requires intent of the statute to be obtained from reading it in its entirety and construing it so as to avoid conflicts. *United States* v. *American Union Transport, Inc. et al.*, 327 U. S. 437; *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, 464.

In construing comparable language in the Interstate Commerce Act (Sec. 1, 32 Stat. 847) it was held that the naked word "discrimination" of necessity must mean unjust or unfair discrimination. *United States* v. *Wells-Fargo Express Co.*, 161 Fed. 606, aff'd 212 U. S. 522. Chief Justice

Taft, speaking of the same section said in *United States* v. *Koenig Coal Co.*, 270 U. S. 512, at page 518:

> "The words advantage, concession and discrimination in the statute must be construed to mean unlawful concession, unlawful advantage, unlawful discrimination."

Summation

This litigation constitutes a tragedy of error. The Court issued its temporary injunction of January 13, 1949 without the slightest supporting proof of likely irreparable damage to plaintiff—instead of dismissing the complaint and leaving plaintiff to proceed before the Maritime Commission (if so advised) as the only proper original step.

Then after the Federal Maritime Board had issued its decision and order of December 1, 1950, dismissing the complaint after full hearing, on basis of the issues specifically tendered by the complaint and answer, the Court, neglecting the established tenets concerning such an administrative decision, overturned said order March 21, 1951, on a ground not raised by the complaint nor litigated by the parties at any time; and thereupon issued its permanent injunction of March 21, 1951—still without any justifying proof of irreparable damage.

Said ground injected by the Court was a play on the word "arbitrary". Its discussion thereon was essentially formalistic only, and did not take into account, but put to one side, the broad purposes of the Shipping Act, 1916, and the long and satisfactory experience thereunder.

The Court's action reduced and converted this case substantially into a "rate case", which neither the parties nor the Commission had intended it to be; and for consideration of which the Court had no facilities, machinery or appropriate knowledge or experience; and on which any decision by it was bound to be purely speculative, because subject

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to unknown conditions and future events not permitting fair appraisal by any court.

The Court completely disregarded the provisions of Section 15 of the Act as to the public interest in respect of agreements as well as that of carriers in the commerce of the country, which provisions if duly taken into account dictated confirmation of the Board's decision, and dismissal of the complaint.

The theory advanced in the appendix annexed to the decision at R. 148 would engraft onto the Act, contrary to and inconsistent with its broad purposes and its language, a duty to be imposed on the Board to make certain advance evidentiary determinations on spreads between rates, and on reasonableness of rates, as a condition for the Board approving usual agreements between carriers as contemplated by Section 15 of the Act in advance of operations under such agreements.

LAST POINT

The decision of the District Court should be reversed with costs, the injunction dissolved and the complaint dismissed and appellants should have such other and further relief as may be just.

Respectfully submitted

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January 7, 1952.

Appendix A

Shipping Act, 1916

Section 14, 39 Stat. 733; 41 Stat. 996 (46 U. S. C. Sec. 812):

That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country,—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume

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of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

SECTION 15, 39 Stat. 733 (46 U. S. C. Sec. 814):

That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

SECTION 22, 39 Stat. 736 (46 U. S. C. Sec. 821):

That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The

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board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act.